IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 751 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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BHIKHABHAI LAXMANBHAI KHARVA - Appellant

Versus

STATE OF GUJARAT - Opponent

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Appearance :
MS SADHANA SAGAR for Appellant.
MR KT DAVE, APP for Opponent.

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 26/02/2007
ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1. Challenge in this Appeal filed under Section 374 of the Code of Criminal Procedure ("the Code" for short) is to the correctness of the judgment and order dated 29.05.2003 rendered in Sessions Case No.35 of 2001 by the learned Additional Sessions Judge, 4th Fast Track Court, Veraval, by which the appellant – Bhikhabhai Laxmanbhai Kharva ("the accused" for short) has been convicted for commission of the offence punishable under Section 376 & 201 of the Indian Penal Code ("IPC" for short) and sentenced to suffer RI for 10 years and fine of Rs.2,000/- and in default thereof, to undergo RI for 6 months for the offence punishable under Section 376 of IPC and RI for 3 years and fine of Rs. 1,000/- and in default thereof, RI for 3 months for the offence

punishable under Section 201 of the IPC. Both the substantive sentences were ordered to run concurrently.

2. Since the facts of the case have been detailed in the judgment of the learned Additional Sessions Judge, Veraval, it is not necessary for us to repeat the same all over again in verbatim and in detail in this judgment. However, the basic facts which are necessary to be discussed in this appeal are as under:-

3. The complainant – Laluben, wife of Ramji Sidibhai Malmadi was residing at Kharva Vad, New Compound, behind old Court, Veraval. She had two sons, namely, Naran and Kishan. Naran was residing with his family. Kishan and his family were residing with her. Her husband expired before about 25 years from the date of incident. Her son Kishan had three daughters and one son. Kanchan is the eldest and she is 10 years old. The prosecutrix aged

about 7 years is the younger than Kanchan and Jignasha is aged about 4 years. The son Sanjay is aged about 8 years and he was suffering from Polio. Her son Naran was residing at the sea-shore. Her son Kishan's daughter i.e. Prosecutrix was residing at the house of Naran. She used to go to the house of Naran in the morning every day and stayed there for the whole day and returned home in the evening.

4. On 29.03.2001, the prosecutrix went to play to the house of Naran from the complainant's house at about 8 O'clock in the morning. The complainant, Kishan's wife Rambai and children were in the house at about 1.00 O'clock in the afternoon and were waiting for Kishan at lunch. At that time, Kharva Bhikha Lakhman aged about 30 – 35 years, a married person and father of four children residing in the neighbourhood of the complainant's son, Naran, came by holding the hand of the prosecutrix to their house. He told the complainant that the prosecutrix had fallen in the sea and he has brought

her by taking her out therefrom. As soon as he told so, the complainant looked at the prosecutrix as to whether she was injured or not. Her clothes were wet. There was no sign of any injury on her hand, leg and body. Her knicker put on by her was not there. The prosecutrix's mother and the complainant were looking at her. In the meantime, the blood drops were falling between the two legs of her. So, the complainant and other felt that the prosecutrix had not fallen in the sea but something had happened. Therefore, upon asking the prosecutrix as to what had happened, the prosecutrix said “i was alone playing on the otta of Rambhai near the house of Naran. Bhikha Chorvadi – the accused residing in the neighbourhood of Naran came to the otta and took me to his house by holding my wrist. Nobody was in his house. I was lifted and made to lay on a bed. My frock was ripped and my knicker was taken off. He took off his pant nearly half and laid down on me. He started copulation by inserting his penis in my vagina. I was feeling pain and it was bleeding. I started crying and i resisted him by crossing my

hand for getting down from me. He pressed my two hands on the cot. He got up by copulating me in lying condition after sometimes and put on the clothes. I was taken to the seashore and bathed. He has come to leave me with wet clothes to our house. There was bleeding between my legs and the accused rubbed blood with my knicker and threw it in the sea." The complainant and others realised as soon as the prosecutrix told this fact. The accused has committed the act of copulation by rape on the prosecutrix who is daughter of the complainant's son. When prosecutrix was telling these facts, the accused jumped from varanda and ran away. The prosecutrix told that when she went to play on the otta of Rambai after taking lunch at about 1.00 O'clock in the afternoon, the accused caught her wrist and took her to his house.

5. As the accused has committed an act of copulation of rape, the prosecutrix was required treatment. So, the complainant, the prosecutrix, mother Rambai

and Ratan – wife of the complainant's son Naran have brought the prosecutrix in a auto-rickshaw to Veraval Govt. Hospital for treatment. The treatment was going on and she lodged the complaint with the Police who has come for inquiry in the Govt. Hospital.

6. An FIR with respect to the alleged incident was filed by the complainant against the accused and it was registered vide C.R. No. I-41/2001 for commission of the offence punishable under Section 376 & 201 of IPC at Veraval city police station. After registration of the complaint, investigation was put into motion. Panchnama of the scene of offence was drawn. Statement of the witnesses were recorded. Clothes of the prosecutrix as well as accused were recovered and sent for FSL for chemical analysis. On receipt of the report from FSL, as sufficient incriminating evidence was found against the accused for commission of the offence of committing rape with the prosecutrix, a charge-sheet was filed against the

accused for commission of offence punishable under Section 376 & 201 of IPC in the Court of learned Judicial Magistrate First Class at Veraval.

7. As the offence under Section 376 & 201 of IPC is exclusively triable by the Court of Sessions, the learned JMFC, Veraval committed the case to the Sessions Court, Veraval.

8. The learned Additional Sessions Judge, Veraval to whom the case was made over for trial, framed charge against the accused for commission of the offence punishable under Section 376 & 201 of IPC. The charge was read over and explained to the accused. As the accused pleaded not guilty to the charge, he was put to trial and tried by the learned Additional Sessions Judge, Veraval in Sessions Case No. 35 of 2001.

9. In order to bring home the charge levelled against

the accused, the prosecution has, in all, examined as many as 16 witnesses, the details of which have been given in paragraph 8 of the impugned judgment and order and the same are as under :-

Sr. No.	Exh. No.	Particulars	Page Nos.
01.	07	P.W. 1 – Dr. Pravinchandra Popatlal Changela.	29-31
02.	12	P.W. 2 – Dr. Pragjibhai Manjibhai Sonariya.	40-42
03.	14	P.W. 3 – Jamnadas Kalyanji Chauhan.	49-50
04.	23	P.W. 4 – Laluben Ramji Siddi.	61-64
05.	25	P.W. 5 – Prosecutrix.	68-71
06.	26	P.W. 6 – Rambai W/o. Kishan Ramji.	72-74
07.	27	P.W. 7 – Ratanben W/o. Naran Ramji.	75-76
08.	30	P.W. 8 – Laljibhai Bavanjibhai	83-84
09.	32	P.W. 9 – Maheshbhai Premjibhai.	87-88
10.	33	P.W. 10 – Paniben D/o. Jayantibhai Meghjibhai.	89-90
11.	35	P.W. 11 – Deviben Devjibhai.	93-94
12.	36	P.W. 12 – Vinodbhai Naranbhai.	95
13.	38	P.W. 13 – Ganesh Premjibhai Malmadi.	97
14.	39	P.W. 14 – Mohanbhai Ratilal.	99
15.	41	P.W. 15 – Rameshbhai Mohanbhai	101-102
16.	43	P.W. 16 – Kalubhai Becharbhai Kayada	104-107

10.To prove the culpability of the accused, the prosecution has also produced number of documents and relied upon the contents of the same, details of which, enumerated in paragraph 9 of the impugned judgment and order, are as under :-

Sr. No.	Exh. No.	Type of Evidence	Page Nos.
01.	03	Charge	11
02.	09	Medical Certificate issued by Veraval General Hospital.	34-35
03.	10	Case papers of the prosecutrix.	36-37
04.	11	Medical certificate of the prosecutrix.	38-39
05.	19	FIR	53-56
06.	24	Complaint given by the complainant.	65-67
07.	31	Panchnama	85-86
08.	34	Panchnama	91-92
09.	37	Panchnama	96
10.	40	Panchnama	99-100
11.	44	Medical Certificate of the prosecutrix.	108
12.	45	Ravanagi note for sending muddamal articles to FSL.	109-114
13.	46	Letter written by FSL to P.I., Veraval.	115
14.	47	FSL Report	116-120
15.	49	Serological Report	122

11.After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions

Judge, Veraval explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement, as required under Section 313 of the Code. In his further statement, the accused denied the case of the prosecution in its entirety and submitted that he has been falsely implicated in the offence alleged against him. He has further stated that a day prior to the date of commission of alleged offence, there was a quarrel between his wife and mother-in-law on the one hand and mother and grandmother of the prosecutrix on the other hand. He has further stated that he was a poor person and he was falsely implicated. A false charge-sheet was filed against him. However, he did not lead any evidence nor did he examine any witness in support of his defence.

12. On appreciation, evaluation, analysis and scrutiny of the evidence, the learned Additional Sessions Judge, Veraval came to the conclusion that the accused has

committed an offence punishable under Section 376 & 201 of IPC. On the basis of the said finding, the learned Additional Sessions Judge, Veraval has sentenced him to suffer RI for 10 years and fine of Rs.2,000/- and in default thereof, to undergo RI for 6 months for the offence punishable under Section 376 of IPC and RI for 3 years and fine of Rs. 1,000/- and in default thereof, RI for 3 months for the offence punishable under Section 201 of the IPC, which has given rise to the instant appeal at the instance of the accused.

13. Ms. Sadhna Sagar, learned advocate appointed by the High Court Legal Aid Committee appearing for the accused has taken us through the oral as well as documentary evidence which are on record and also assailed the judgment and order of the learned Additional Sessions Judge, Veraval. She has further submitted that the learned Additional Sessions Judge, Veraval has erred in convicting the accused though there was no cogent or adequate evidence

showing his guilt in the matter. She has further submitted that the learned Additional Sessions Judge, Veraval has failed to appreciate that the accused is innocent and has not committed the alleged offence. She has further submitted that the evidence pressed into service by the prosecution is untrustworthy, unreliable and can never form basis of conviction.

14. She has further submitted that the evidence of P.W. 1 – Dr. P.P. Changela at Exh. 7 makes it clear that there was no external injury on the prosecutrix. There was no sign of semen either on the clothes, vagina or any part of the body of the prosecutrix. No presence of sper on the vagina of the prosecutrix. This shows that the accused has not committed rape on the prosecutrix. She has further submitted that the prosecutrix in her cross-examination at Exh. 25 has stated that when she has gone for latrine at sea-shore, sea creature has caused an injury on her private part and because of that, the blood was

coming out. At the place where the alleged incident was taken place, so many persons were residing and hence, the story put up by the prosecution that the accused has taken the prosecutrix at his house and from there, he took her to the sea-shore is not believable. No independent witness from the surrounding area has been examined by the prosecution. Since the wife and mother-in-law of the accused had quarrel with the mother and grandmother of the prosecutrix on the day prior to the date of incident, false case was filed against the accused and he was falsely implicated. She has, therefore, submitted that the impugned judgment and order passed by the learned Additional Sessions Judge, Veraval is required to be quashed and set aside and the accused is required to be released forthwith.

15. Ms. Sadhna Sagar has further submitted that on overall view of the matter and on proper appreciation of the evidence, there is gross infirmity

and illegality in the reasons assigned by the learned Additional Sessions Judge for convicting the accused and, therefore, there is valid reason and justifiable ground to interfere with the impugned judgment and order convicting the accused for the offences for which he was charged.

16. Mr. K.T. Dave, learned Additional Public Prosecutor, on the other hand, has supported the order and judgment of the learned Additional Sessions Judge, Veraval and submitted that the prosecution has established the charge levelled against the accused beyond any reasonable doubt. The documentary evidence on the record of the proceedings clearly establish the involvement, presence and role of the accused for the offences charged against him. He has further submitted that the prosecutrix's own deposition at Exh. 25 makes it clear that the accused has taken her to the sea-shore and for the purpose of destroying the evidence, he threw her in the sea and compelled her to take bath and thereafter, she was

taken to her house. At that time, the mother and grandmother of the prosecutrix were present and they have seen that prosecutrix has not put on her knicker and blood was coming out from her private part between the two legs. The conduct of the accused is also important as when the prosecutrix and her mother and grandmother were talking about this incident, the accused has jumped from the varanda and ran away. The medical evidence of Dr. P.P. Changla Exh. 7 and Dr. P.M. Sonariya Exh. 12 corroborates the prosecution version of the accused having committed rape on the prosecutrix. The learned Additional Sessions Judge, Veraval has rightly accepted the deposition of the prosecutrix and other witnesses as well as medical evidence and FSL Report. He has, therefore, submitted that the learned Additional Sessions Judge, Veraval has discussed at length this aspect of the matter, which is based on correct appreciation of evidence and on sound reasoning, which should not be interfered with by this Court.

17. We have considered the submissions advanced by the learned advocates appearing for the parties at length and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. We have also gone through the entire testimonial collections. We have applied our mind to the judgment and order passed by the learned Additional Sessions Judge, Veraval, convicting the accused for commission of the offence punishable under Section 376 & 201 of IPC and sentencing him to suffer RI for 10 years and fine of Rs.2,000/- and in default thereof, to undergo RI for 6 months for the offence punishable under Section 376 of IPC and RI for 3 years and fine of Rs. 1,000/- and in default thereof, RI for 3 months for the offence punishable under Section 201 of the IPC.

18. In order to find out whether the prosecution has established the charge against the accused beyond reasonable doubt and whether the learned Additional Sessions Judge, Veraval has recorded a just and correct conclusion holding the accused guilty, we may first advert to the oral testimony of the prosecution witnesses.

A) P.W. 5 – Prosecutrix is examined at Exh. 25. At the time of her examination, she was 8 ½ years old. The learned Additional Sessions Judge, Veraval was of the view that she was in a position to give her statement before the Court and hence, she being minor, was examined without giving oath to her. She testified that on the date of incident, she has gone to the house of her uncle Naranbhai. She has gone to play outside the house and at that time, her aunt Ratanbai was in the house. When she was playing at about 8.00 O'clock in the morning on the date of incident, the accused had come there and he has taken her to his house. He took off her frock and

knicker and at that time, there was no one in the house. She has narrated the entire incident as to what has happened on that day in the house of the accused. From there, the accused took her to the sea-shore and from there she was taken to her house. On reaching to the house, she narrated the entire story to her mother and grandmother and at that time, the accused has jumped from the varanda and ran away.

B) P.W. 4 – Complainant Laluben, the grandmother of the prosecutrix was examined at Exh. 23. She testified that on the day of incident, the prosecutrix has gone to the house of his son Naran. At about 12.00 O'clock in the afternoon, when the accused had come to drop the prosecutrix, she asked the accused and at that time, she was told that the prosecutrix fell down in the sea and he rescued her. She further testified that there was no knicker put on by the prosecutrix and blood was coming out from her private part. She has asked the prosecutrix and

the entire incident as stated in the complaint was narrated by the prosecutrix to her. She has further testified that she took the prosecutrix to Govt. Hospital, Veraval and from there, she lodged a complaint which is at Exh. 24.

C) P.W. 6 - Rambai is the mother of the prosecutrix. She is examined at Exh. 26. She also testified that when the accused has come along with the prosecutrix, she was there in the house and the entire story narrated by the prosecutrix before them was confirmed by her in her deposition.

Thus, from the depositions of the prosecutrix, complainant Laluben and P.W. 6 – Rambai, it is clear that the accused has committed rape on the prosecutrix. The prosecution case gets corroboration from the oral as well as documentary evidence from Dr. P.P. Changela and Dr. P.M. Sonariya.

D) Dr. P.P. Changela in his examination at Exh. 7 has stated that on 29.03.2001, he was in Govt. Hospital,

Veraval and the prosecutrix was brought before him by her mother and grandmother and the story told by them to him was that she was raped by the accused. He has produced the case papers of the prosecutrix at Exh. 10. He has further testified that while examining the prosecutrix, semen was found on her vagina. Her hymen was ruptured and there was swelling thereon. He was of the view that rape was committed on her. He has produced MLC Certificate at Exh. 9.

E) P.W. 2 – Dr. P. M. Sonariya in his examination at Exh. 12 has testified that the accused was brought before him on 30.03.2001. He noticed a scar below the skin of the penis of the accused and blood was coming out from there. He further testified that if the rape is committed on a girl aged about 7-8 years, such injury is found on the penis of the accused. From the evidence of these two Doctors who have examined the prosecutrix as well as the accused, it becomes clear that the accused has committed rape

on the prosecutrix.

F) P.S.O. J. K. Chauhan is examined at Exh. 17. He testified that on 29.03.2001, Dr. Changela from Govt. Hospital, Veraval has telephoned him and informed about commission of offence of rape on the prosecutrix. He has made an entry No. 17 in the register maintained at Veraval Police Station and further investigation was entrusted to PSI, Kayada. PSI, Kayada in his deposition at Exh. 43 has testified that he received the police yadi at Exh. 21 and he has gone to Govt. Hospital, Veraval and registered the complaint lodged by the grandmother of the prosecutrix. He has produced the relevant extract from the station diary at Exh. 20.

19. In view of the aforesaid evidence, according to this Court, the sole testimony of the prosecutrix herself is sufficient to establish the charge of rape against the accused. However, her oral testimony is corroborated by the evidence of the complainant as

well as her mother and Dr. P.P. Changela and Dr. P.M. Sonariya. A perusal of the FSL Report and Serological Report also unequivocally suggest that semen and blood stains were found on the clothes of the accused.

20. In view of the aforesaid discussion, according to us, there is no manner of doubt that the prosecution has established the charge levelled against the accused for commission of rape on a seven year old girl. Therefore, it is not necessary for us to discuss the evidence of other prosecution witnesses.

21. On having close scrutiny of the evidence on record, we find no infirmity in the findings, ultimate conclusion and the resultant order of conviction and sentence recorded by the learned Additional Sessions Judge, Veraval. We are in complete agreement with the said findings, ultimate conclusion and resultant order of conviction and sentence as according to us, no other conclusion is

possible except the one reached by the learned Additional Sessions Judge, Veraval on the facts and in the circumstances of the case.

22. No new argument is advanced. No new criticism is offered. No infirmity in the reasoning of the learned Additional Sessions Judge, Veraval is pointed out. The evidence has been carefully analyzed and fully appreciated in the closely reasoned judgment with which we fully concur. We do not think it right to invest more time in reiterating the same reasoning in our language or giving the same answers to the same criticism in our own words for the sake of brevity.

23. In the aforesaid view of the matter, according to us, there is no valid reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Veraval.

24.The manner and way in which the offence of rape was committed on a seven-year-old girl, no leniency for reduction of sentence can be shown upon the accused.

25.At this stage, it would be appreciable to refer to the latest judgment of the Supreme Court in the case of ***State of M.P. v. Santosh Kumar, (2006) 6 SCC 1***. The Supreme Court has considered the “adequate and special reasons” for awarding of sentence below the statutory minimum in the case of offence of rape. In the said case, a six-year-old child was subjected to sexual abuse by the respondent. The trial Court found the respondent guilty of the offence punishable under Section 372(2)(f) IPC. The respondent was sentenced to undergo 10 years' RI with a fine of Rs.500/- with default stipulation. In the appeal filed before the High Court, the accused did not question the conviction, but prayed for reduction in sentence. The High Court reduced the sentence for the offence punishable under Section

376(2)(f) IPC to 5 years, while maintaining the sentence in respect of other offences. The only ground indicated by the High Court to reduce the sentence was the young age of the accused and he being a member of the Scheduled Tribe. In the said circumstances, the questions that arose before the Supreme Court were the proper sentence and acceptability of reason which weighed with the High Court for reducing the sentence.

Allowing the appeal and restoring the minimum mandatory statutory sentence imposed by the trial Court, the Supreme Court **Held**:

"Both, in cases of sub-sections (1) and (2) of Section 376 the court has the discretion to impose a sentence of imprisonment less than prescribed minimum for "adequate and special reasons". If the court does not mention such reasons in the judgment there is no scope for awarding a sentence lesser than the prescribed minimum. In order to exercise the discretion of reducing the sentence, the statutory requirement is that the court has to record "adequate and special reasons" in the judgment and not fanciful reasons which would permit the court to impose a sentence less than the prescribed

minimum. The reason has not only to be adequate but also special. What is adequate and special would depend upon several factors and no straitjacket formula can be indicated.

What is applicable to the trial courts regarding recording reasons for a departure from minimum sentence is equally applicable to the High Court. The only reason indicated by the High Court in the present case is the young age of the accused and the fact that he belongs to a Scheduled Tribe. The same can by no stretch of imagination be considered either adequate or special. The requirement in law is cumulative.

It is to be noted that the victim in the instant case is a child who was about 6 years of age at the time of commission of offence. Section 376(2) IPC provides for a more stringent punishment when the victim is under 12 years of age. In the instant case, the High Court was clearly in error in reducing the sentence without recording any adequate and special reason in imposing a lesser sentence."

26. Applying the principles laid down by the Supreme Court in above referred to judgment to the facts of the present case, it is seen that in the instant case

also the victim is a seven-year-old girl, therefore, the sentence of 10 years' RI imposed upon the accused, does not call for any interference.

27. After commission of the offence of rape, the accused has tried to destroy the evidence and hence, he has also committed an offence under Section 201 of IPC.

28. On the wake up of the aforesaid, we are not inclined to interfere with the judgment and order of conviction and sentence recorded by the learned Additional Sessions Judge, Veraval, and hence, this Appeal lacks merit, and deserves to be dismissed.

29. For the foregoing reasons, the Appeal fails and is accordingly dismissed.

[A. M. KAPADIA, J.]

[K. A. PUJ, J.]

Savariya